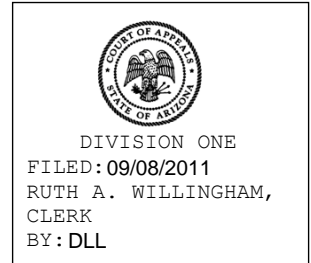


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



STATE OF ARIZONA,) No. 1 CA-CR 10-0428
)
Appellee,) DEPARTMENT D
)
v.) **MEMORANDUM DECISION**
)
) (Not for Publication -
RON DAMON BROWN,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)
)
)

Appeal from the Superior Court in Maricopa County

Cause Nos. CR2009-117976-001 DT

The Honorable Lisa M. Roberts, Judge Pro Tem

AFFIRMED

Thomas C. Horne, Arizona Attorney General Phoenix
by Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
Robert A. Walsh, Assistant Attorney General
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G E M M I L L, Judge

¶1 Defendant Ron Damon Brown appeals from his convictions
and sentences for one count of sexual abuse and two counts of

sexual conduct with a minor under the age of fifteen. He argues that the trial court erred by admitting evidence pursuant to Ariz. R. Evid. 404(c) of other sexual acts he committed with the victim. For reasons set for below, we affirm.

FACTS¹ AND PROCEDURAL HISTORY

¶2 Brown met Sandra sometime in 1999 or 2000. He first met Sandra's daughters J and C sometime in 2000 or 2001, while Sandra was still living at her parents' house. J was born on November 1993.

¶3 In February 2003, Sandra and her daughters moved into their own apartment in Phoenix, and Brown and Sandra began a more "serious" relationship. J was nine years old when they moved into the apartment; Brown was thirty-one. A "month or two" after their move, Sandra gave Brown a key to the apartment so that he could "have access whenever he wanted." Sometime in 2005, Brown moved in with Sandra and her daughters and began referring to the girls as his "stepdaughters" and helping to pay the household bills.

¶4 In 2006, when J was twelve years old, Sandra discovered that Kent Marshall, an adult living in the same

¹ The applicable standard of appellate review requires that we view the evidence in the light most favorable to sustaining the verdicts and resolve all reasonable inferences in support of the convictions. See *State v. Manzanedo*, 210 Ariz. 292, 293, ¶ 3, 110 P.3d 1026, 1027 (App. 2005).

apartment complex, had been having sexual relations with J. Sandra reported the matter to the police the same day that she learned of it, and Marshall was ultimately charged and convicted for his crimes. Brown was a member of the household at the time and offered Sandra "moral support" throughout in dealing with the matter.

¶15 In January or February of 2009, Brown and Sandra "broke up" because he and Sandra were having "relationship problems," and Brown moved out of the apartment. Near the middle of February, Sandra brought a new male friend to the apartment; and when J saw him, "it just set her off." It made J angry that Brown had "just moved out" and that Sandra "had got a new boyfriend" and "brought another guy to the house." Consequently, she "started a fight" with her mother, during the course of which she revealed that Brown had been "having sex with her" for four years.

¶16 J recalled that Brown abused her for the first time in their apartment on April 21, 2003, when she was nine years old. They were lying on a bed in her mother's bedroom with her sister waiting for her cousin to arrive so they could celebrate his birthday. Brown was lying on the bed between J and her sister; and, when J got up to go to the bathroom, she accidentally touched his penis with her hand. Brown "pulled [her] back down," positioned a pillow so that her sister could not see his

hand, put his hand under the sports bra she was wearing, and manipulated her nipples "for five minutes." Brown only stopped after J stated that her cousin had arrived so that she had "a reason to get out of the room."

¶17 On the weekend after this incident, Brown first had sexual intercourse with J after Sandra had left him alone with the girls in the apartment while Sandra went out with her cousins. Brown came into J's bedroom, got on top of her, and "put his penis in [her] vagina." J knew his penis was inside her vagina "[b]ecause it was hurting." Brown told J not to tell her mother.

¶18 J specifically remembered a third incident when Brown told her that "sex was supposed to happen to her." This occurred one evening when J had been asleep on the couch in the living room. Brown had come home, woken her, "bent [her] over the couch," and inserted his penis in her vagina. As he was having intercourse with her, Brown had made the statement that "this was supposed to happen" to her. J could not recall the precise date that the couch incident took place. However, she did recall that she was still wearing a nightgown with no underwear when it occurred, which indicated that the assault occurred before she was twelve years old when she switched to wearing pajamas with underwear beneath them. J also recalled that she was attending elementary school at Villa de Paz at the

time.

¶19 According to J, after the initial intercourse, Brown had sex with her "a lot;" she estimated that it occurred "[o]ver 50 times . . . [e]verywhere in the house," even in her mother's bedroom. Although all three incidents involving Brown occurred prior to her abuse by Kent Marshall, J did not reveal Brown's abuse to the police or her mother or to anyone involved in the Marshall investigation because she was "scared"; because "[the sex] seemed normal"; and because, at the time, she "did not realize that it wasn't normal, that something was wrong." Brown did stop having sex with her while Marshall was being prosecuted; however, that lasted only a month and then Brown resumed his sexual relations with her.

¶10 J was unable to remember additional acts of sexual abuse by Brown with any specificity because the abuse happened so often to her that "[i]t's starting to seem all the same." It was only her sheer anger at her mother's introduction of a new boyfriend to their home, when Brown had only just left it, that finally enabled or motivated J to tell her mother what Brown had done to her.

¶11 Sandra initially did not believe J's disclosures because she did not think that Brown "would be capable of doing something like that." Either that same night or the following day, using J's cell phone, Sandra texted Brown "I'm going to

tell my mom what you did." Almost immediately, Sandra received a text message from Brown in return saying, "[P]lease don't. I never meant to hurt you or your mom." Two minutes after that, Brown telephoned J's cell phone. Sandra answered the call and immediately confronted Brown with the fact that he had been having sex with her daughter. When she asked him "what he was thinking" in doing that to J, Brown only answered that he was "sorry and that he didn't mean for anything to happen like that" and that he "didn't know why he did it . . . and he didn't know what he was thinking."

¶12 Unlike she had done when she learned of Marshall's abuse, Sandra did not immediately call the police to report Brown's crimes. Instead, she waited several days during which she had Brown return a truck they co-owned to her and also make some monthly payments due on it. Although Brown told Sandra that "he would do whatever as long as [she] didn't call the police on him," Sandra intended to call the police all along and never made any explicit promise not to do so. She was concerned about the truck and the money because the truck was in her name and she was worried about her credit rating. A week and a half later, after Brown had returned the truck to her and given her money for the outstanding payments, Sandra called the police.

¶13 Phoenix Police Detective F. of the Crimes Against Children Bureau interviewed Sandra and J on March 12, 2009. At

Detective F.'s request, Sandra also engaged in a confrontation call² with Brown. During the confrontation call, Brown admitted having sex with J starting when she was nine years old, but could not remember how many times it happened because he "wasn't counting or keeping track or nothing like that." Brown admitted to "touching her boobs" and "just the sex thing," but professed to be unable to explain "why this happened, how it happened, why I did it." When Sandra asked Brown if J needed a "pregnancy test," Brown replied that she did not need one because he "pulled out" every time and had "never 'came' inside her." To Sandra's accusation that he had had sex with J "for four years," Brown only replied, "I know, I know[,] [b]ut I'm just saying I don't even know why . . . what possessed me to do it."

¶14 Brown was arrested the day of the confrontation call and interviewed by Phoenix Police Detective V.G. The interview was audio and video taped and a DVD of the interview was later played for the jurors during the trial. Although Brown claimed that he could not remember specific incidents or how many times he had had sex with J, he never denied that sexual intercourse had happened, specifically, that he had put his penis in her vagina and touched her breasts. Brown also admitted having sex with J in various rooms in the apartment, including J's bedroom,

² The call was audio taped, and the tape was played for the jury at trial. A transcript of the call was also given to the jury.

her mother's bedroom, and the living room. When pressed to do so by Detective V.G., Brown estimated that he had had sex with J about "ten" times or "more than ten times" and agreed that he had had sex with her when she was nine or ten until she was fourteen. He denied having oral or anal sex with J, and admitted that his conduct was limited to vaginal sex and to touching J's breasts both over and under her clothing. He told Van Gordon that he felt "sick to his stomach afterwards" and while he could not "remember" telling J that he would "stop" he told himself that "all the time." He also confirmed that he had stopped for a while when the Marshall incident occurred because he was "scared," but that he started again because he was "hard headed." Brown maintained throughout that he did not know why he had done what he had done, "what possessed [him]," because he did not think about children "that way."

¶15 The State charged Brown with the three felony counts that reflected the three instances of abuse J specifically remembered: Count 1, sexual abuse with a minor under fifteen years of age (direct or indirect touching, fondling, manipulation of breast), a Class 3 felony and dangerous crime against children; Count 2, sexual conduct with a minor under fifteen years of age (penile/vaginal contact (first time)), a Class 2 felony and dangerous crime against children; and Count 3, sexual conduct with a minor under fifteen years of age

(penile/vaginal contact (time on couch)), a Class 2 felony and dangerous crime against children.

¶16 Brown testified at trial and categorically denied having any sexual contact of any kind with J. He maintained that he had only acquiesced to the accusations during the confrontation call because he was "scared" and knew where "it was going to lead" because of what had happened to Marshall. At trial, he characterized his payments to Sandra and the return of the truck as "blackmail." He therefore acquiesced to her accusations because he "wanted this to go away" and "thought maybe" that all that Sandra would do "is just . . . keep me going by blackmailing me."

¶17 Brown testified that he had gone along with Detective V.G.'s accusations during the interview, not because they were "true," but merely because Detective V.G. had made him "feel that what [he] said and what [he told] her and what she wanted to hear would help [him]." He testified that his "thing" was to "act like [he] was scared" and to "act like [he] was remorseful" with Detective V.G. because it would help him, not because he was "guilty."

¶18 On cross-examination, Brown admitted that he had never mentioned the truck or the payments or the issue of "blackmail" or extortion during either the confrontation call or his interview with Detective V.G. Following up from a jury

question, Brown also admitted to the prosecutor that he had only "acted" remorseful because he was "trying to manipulate the process."

¶19 At the conclusion of the trial, the jury found Brown guilty of all the offenses as charged. In a separate hearing, the jury found the following aggravating factors: (1) emotional harm to the victim; (2) Brown held a position of trust and/or duty of conscience towards the victim; and (3) the abuse was chronic, occurring over several years.

¶20 On May 14, 2010, the trial court sentenced Brown to the presumptive term of five years in prison on Count 1 and to the aggravated term of life imprisonment on each of Counts 2 and 3. The court also ordered that all of the sentences be served consecutively to each other.

¶21 Brown timely appealed. This court has jurisdiction pursuant to the Arizona Constitution, Article 6, Section 9, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1)(2003), 13-4031 and -4033 (2010).

DISCUSSION

¶22 Brown's sole argument on appeal is that the trial court erred in permitting the State to present evidence of other sexual acts Brown performed on J pursuant to Ariz. R. Evid. 404(c). Specifically Brown objects to the fact that J was permitted to testify (1) that Brown had sexual intercourse with

her on many occasions during the time period when she was between nine and twelve or fourteen years of age, even though she could not give any specific details as to the times, dates or particular sexual acts involved, and (2) that Brown had sexual intercourse "at least 50 times subsequent to the charged offenses, at various unspecified places in her mom's apartment."

¶23 We review a trial court's admission of uncharged acts evidence pursuant to Ariz. R. Evid. 404(c) for an abuse of discretion. *State v. Garcia*, 200 Ariz. 471, 475, ¶ 25, 28 P.3d 327, 331 (App. 2001) (citation omitted). In so doing, we view any disputed evidence "in the light most favorable to the proponent, maximizing its probative value and minimizing its prejudicial effect." *State v. Kiper*, 181 Ariz. 62, 66, 887 P.2d 592, 596 (App. 1994).

¶24 "An abuse of discretion is 'an exercise of discretion [that] is manifestly unreasonable, exercised on untenable grounds or for untenable reasons.'" *State v. Wassenaar*, 215 Ariz. 565, 570, ¶ 11, 161 P.3d 608, 613 (App. 2007). "[A]bsent a clear abuse of discretion, this court will not second-guess a trial court's ruling on the admissibility or relevance of evidence." *State v. Spreitz*, 190 Ariz. 129, 146, 945 P.2d 1260, 1277 (1997). We find the trial court did not abuse its discretion when it admitted the evidence pursuant to Rule 404(c).

¶125 Rule 404(c) provides that evidence of other crimes, wrongs, or acts is admissible in criminal cases involving sexual offenses if it is "relevant to show that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the offense charged." It also provides that, prior to admitting such evidence, the trial court must first make three findings:

- (A) The evidence is sufficient to permit the trier of fact to find that the defendant committed the other act.
- (B) The commission of the other act provides a reasonable basis to infer that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the crime charged.
- (C) The evidentiary value of proof of the other act is not substantially outweighed by danger of unfair prejudice, confusion of issues, or other factors mentioned in Rule 403. In making that determination under Rule 403 the court shall also take into consideration the following factors, among others: (i) remoteness of the other act; (ii) similarity or dissimilarity of the other act; (iii) the strength of the evidence that defendant committed the other act; (iv) frequency of the other acts; (v) surrounding circumstances; (vi) relevant intervening events; (vii) other similarities or differences; (viii) other relevant factors.

Ariz. R. Evid. 404(c)(1)(C).

¶126 Prior to trial, the State filed a notice of its intent to admit evidence of other uncharged sexual acts Brown committed

against J pursuant to Rule 404(c) and *State v. Garner*, 116 Ariz. 443, 569 P.2d 1341 (1977).³ The "other act" evidence related to J's statements that Brown had had sex with her "over 50 times" during the four-year period from when she was nine to when she was fourteen years old. Brown objected to the introduction of the evidence at trial, arguing that there was insufficient evidence that he committed the acts, that the victim's inability to recall specific details of the acts made the evidence unreliable, that it was unclear if the other acts were similar and/or too remote, and that the fact that most of the other acts occurred after the charged offenses did not provide a reasonable basis for finding that he had a character trait giving rise to an aberrant sexual propensity to commit the charged offenses. According to Brown, the probative value of the evidence was therefore substantially outweighed by the danger of unfair prejudice.

¶127 On November 13, 2009, the trial court held a hearing on the matter. In support of its position, the State offered a tape of the confrontation call, two tapes of forensic interviews with J, "the confession CD" between Detective V.G. and Brown, and a tape of the forensic interview of the victim's sister.

³ In cases involving sex offenses against a child, evidence of prior similar acts committed against the same child are admissible to show lewd disposition or unnatural attitude toward same victim. 116 Ariz. at 447, 569 P.2d at 1345.

The State argued that the victim's statements during her forensic interview "alone" would provide sufficient evidence that the other sexual acts had occurred, but that, here, where the trial court also had the evidence of Brown's statements during his interview, the evidence was more than sufficient to establish under the "clear and convincing standard" that the other sexual acts had occurred. See *State v. Terrasaz*, 189 Ariz. 580, 582, 944 P.2d 1194, 1196 (1997) (profferer to prove by clear and convincing evidence that other bad acts were committed and that defendant committed them).

¶128 In addition to reiterating his general concern that "extreme prejudice" would result from the jury simply hearing about all the other acts, defense counsel stated that he was primarily concerned because one of the charges (Count 3/sexual intercourse on the couch) alleged that the sexual conduct "occurred at some point in the entire year." According to defense counsel, the evidence posed the great risk of "misleading" by not allowing the jury to "differentiate" between the substance of "all those uncharged acts" and the "actual substance" of the third charged act. The State responded by arguing that defense counsel's specific concerns regarding Count 3 could be successfully addressed via a *voir dire* inquiry that ascertained whether prospective jurors were capable of separating charged versus uncharged conduct coupled with a final

limiting instruction to the jury.

¶129 After taking the matter under advisement and reviewing all of the evidence, including the various audio and video taped interviews, the trial court ruled that the other act evidence was admissible pursuant to Rule 404(c). The trial court first found that the victim's statements in her interviews, Brown's statements in the confrontation call, and Brown's admissions to Detective V.G. established "by clear and convincing evidence" that the other acts of abuse had indeed occurred. Despite the fact that the victim was not able to recall specific dates and details about the other acts of abuse, the court noted that the victim's firm allegation that the abuse occurred repeatedly over the period of time was corroborated by Brown's statement to Detective V.G. that he had sexual intercourse with the victim "approximately 10 times" and his statements to Sandra in the confrontation call that he had had sex with her "over a four year period enough times that he could not remember how many times it occurred." Ariz. R. Evid. 404(c)(1)(A).

¶130 Next, the trial court found the other acts provided a reasonable basis to infer that Brown had an aberrant sexual propensity. Given evidence of the "repeated sexual abuse of the same child over an extended period" of time, the court reasoned that "[a]ny reasonable person" would find that an adult who committed those types of acts against a child between the ages

of nine and thirteen, repeatedly and consistently, would have "an aberrant sexual propensity to commit charged crimes." The other acts would therefore provide the jury with "a reasonable basis" for inferring that Brown had "a character trait giving rise to an aberrant sexual propensity to commit the crime alleged." Ariz. R. Evid. 404(c)(1)(B).

¶31 Finally, the trial court found that (1) the other sexual acts "were not remote in time" but were instead "continuous and . . . identical to the charged acts"; (2) based on Browns's corroborating admissions and statements, there was "strong evidence" upon which a jury could conclude that defendant committed the other acts "frequently and repeatedly, over the period at issue." Ariz. R. Evid. 404(c)(1)(C). In applying the required Rule 403 balancing, the trial court specifically found that, although the other act evidence was "certainly prejudicial," it was not "unfairly prejudicial" and that its evidentiary value was "not substantially outweighed by the danger of unfair prejudice."

¶32 In ruling the evidence admissible, the trial court also rejected defense counsel's argument that the other acts were not admissible to show propensity because they occurred *after* the three charged offenses. It found that Rule 404(c) "codified and expanded *Garner* and similar cases" and that the language of Rule 404(c) imposed no requirement that the other

acts had to have happened before the charged acts in order to prove an aberrant propensity. *See, e.g., State v. Hargrave*, 225 Ariz. 1, 8, ¶ 10, 234 P.3d 569, 576 (2010) (evidence of defendant's prior or subsequent acts not admissible to show defendant is bad person or propensity for committing crimes but is admissible for exceptions set forth in 404(b)); *State v. Moreno*, 153 Ariz. 67, 69 734 P.2d 609, 611 (App. 1986) (evidence of subsequent act admissible to show 404(b) knowledge or intent). *See also State v. Marshall*, 197 Ariz. 496, 500-501, ¶ 13, 4 P.3d 1039, 1043-44 (App. 2000) (other sexual acts with same victim admissible to show propensity to commit aberrant sex upon victim or intrinsic because intertwined with charged crime).

¶133 On appeal, Brown challenges the trial court's ruling, arguing that the "lack of reliability" of the victim's testimony concerning the other sexual acts made the evidence particularly susceptible to prejudicing the jury in this case. He reasons that the evidence of the other acts "undoubtedly confused the issues" and rendered the jury unable to "differentiate between the uncharged acts and the sexual intercourse alleged in Counts 2 and 3" because the "victim could not even recall at the time of trial how old she was during the last charged incident of sexual intercourse which occurred on her couch."

¶134 We first address Brown's argument that the evidence of

the other acts was "unreliable" simply because the victim could not give "specific information regarding the dates, places, manner of sexual conduct, etc., other than stating that she had sexual intercourse with [Brown] at least 50 times throughout her mother's apartment." The trial court found that clear and convincing evidence of the other sexual acts was established not only by the victim's statements, but also by Brown's own admissions. The record supports the court's finding.

¶135 The court noted that J, in her interviews, "firmly alleged" that the other acts of abuse occurred "repeatedly over the period of time." Thus, J's statements alone would have been sufficient proof of the other acts. See *State v. Jerousek*, 121 Ariz. 420, 427, 590 P.2d 1366, 1373 (1979) (in child molestation case, defendant may be convicted on uncorroborated testimony of victim). But here, Brown's own statements to Sandra and Detective V.G. corroborated J's statements that he had sex with her multiple times throughout the apartment when she was between the ages of nine and twelve. Brown told Detective V.G. that he had not counted the number of times he had sex with J but that he estimated that it was ten times or more than ten times and that it had taken place in her bedroom, her mother's bedroom, and in the living room. He agreed with Detective V.G. that he had intercourse with J from the time she was nine or ten up until she was fourteen. He also specifically admitted that he

had limited his sexual contact to touching J's breasts and to penile vaginal intercourse. He confirmed J's testimony that he had stopped having sex with J for a while when Marshall's abuse was discovered in 2006, when J was thirteen years-old, but that he started having sexual relations with her again after that. Brown made similar admissions to Sandra during the confrontation call. He told her that he had touched J's breasts and engaged in "just the sex thing," but that he had always pulled out before ejaculating. He also admitted that he started having sex with her when she was nine, but that he could not remember how many times it had happened because he "wasn't keeping track."

¶136 The fact that a child victim of abuse may not remember the exact dates or times of offenses does not necessarily mean that evidence of the acts is not admissible into evidence if the child is otherwise certain of when they occurred. *Id.* at 427, 590 P.2d at 1373. Furthermore, here, J's allegations concerning the other acts of sexual intercourse, as well as the time frame in which they occurred, were sufficiently corroborated by Brown's admissions and statements to police and her mother. The trial court did not abuse its discretion in finding that the other act evidence was proven by clear and convincing evidence, and that it was therefore reliable and admissible under Rule 404(c) to show that Brown possessed a character trait that gave rise to an aberrant sexual propensity to commit the crimes with

which he was charged against J.

¶137 Nor did the trial court abuse its discretion in finding that the probative value of the uncharged acts was not substantially outweighed by the danger of unfair prejudice. Ariz. R. Evid. 404(c)(1)(C). The "frequency," "remoteness" and "similarity"⁴ issues are all satisfied by the substantial evidence that Brown had committed the same act, sexual intercourse, with the same victim, repeatedly, over a span of four years. Furthermore, as required by Rule 404(c)(2), the trial court properly gave the jury a limiting instruction. It instructed the jurors that they were to use this evidence of the other acts to determine if Brown had a character trait that predisposed him to commit the charged crimes. The court cautioned the jurors that they could not convict Brown of the crimes charged simply because they find that he committed these uncharged acts. The court also emphasized that evidence of the other acts did not lessen the State's burden of proving Brown's guilt "beyond a reasonable doubt."

¶138 Additionally, in this case, the prosecutor in her closing argument urged the jury to review and adhere to the trial court's instructions regarding the other act evidence and to "be fair to the Defendant and the State."

⁴ Brown concedes that the uncharged acts were similar to the charged acts, but maintains that this may actually have added to the prejudice by confusing the issues.

¶39 Brown cites *Garcia* in support of his argument that the evidence was improperly admitted. However, *Garcia* does not support Brown's arguments. *Garcia* acknowledges the admissibility of 404(c) uncharged act evidence to establish a defendant's "lewd disposition toward a particular victim" or to establish "an aberrant sexual propensity to commit the charged crime." 200 Ariz. at 476, ¶¶ 30-31, 28 P.3d at 332. In *Garcia*, the trial court abused its discretion by "neglecting to perform Rule 404(c) screening and a Rule 403 balancing test before admitting a large volume of uncharged acts evidence at trial." *Id.* at 479, ¶ 45, 28 P.3d at 335. As reflected in our discussion above, the trial court in this case carefully engaged in the appropriate 404(c) and 403 analyses before determining that the other act evidence was admissible. Furthermore, the record supports its findings. Therefore, unlike the *Garcia* court, the trial court performed the appropriate screening and did not abuse its discretion.

¶40 Brown raises two additional issues which he contends "compounded" the problem of confusion and therefore increased the probability of "undue prejudice" as a result.

¶41 At the close of the evidence, the trial court permitted the State to amend the time reference in Count 3, the incident on the couch, to reflect the testimony at trial. Originally, the charge read that the offense occurred between

the "22nd day of November 2002 and the 21st day of November 2003." The trial court granted the State's motion to amend the time reference to between the "1st day of May 2003 and the first day of January 2005." Brown argues that the amendment shows that the State could not prove that the crime was committed between November 22, 2002, and November 21, 2003. Given that the other act evidence of "50 incidents of sexual intercourse" could have overlapped with the incident alleged in Count 3, Brown contends that the amendment essentially allowed the State to "prove" Count 3 "through the introduction of the excessively prejudicial other sexual acts evidence." This argument is unpersuasive.

¶42 The date of an offense is not an element of sexual assault. *State v. Jones*, 188 Ariz. 534, 543, 937 P.2d 1182, 1191 (App. 1996); A.R.S. § 13-1406. An error in the date of an offense alleged in an indictment does not change the nature of the offense charged and may be remedied by amendment. *Id.* at 544, 937 P.2d at 1192; Ariz. R. Crim. P. 13.5(b).

¶43 The dates were changed based on J's testimony at trial that she was still wearing a nightgown with no underwear underneath when the couch incident took place, that she was attending elementary school at the time, and that it predated her abuse by Marshall, which began when she was twelve. Based on J's age and the other testimony at trial, the prosecutor and

the court agreed that the range from May 1, 2003⁵ up to January 1, 2005, when she would have been twelve, was reflective of the evidence.

¶44 Nor do we find any evidence in the record that, as Brown argues, the jury could have confused the events charged in Counts 2 and 3 either because of the other act evidence or because of the amendment to Count 3. J testified to two specific acts of sexual intercourse, which were the two offenses charged in Count 2 and Count 3. The verdict forms referred to those specific acts: Count 2 specified "(First Time)"; Count 3 specified "(Time on Couch)." The charge in Count 2 specifically dealt with the "first time" Brown had sexual intercourse with J in her bedroom, which J specifically testified, occurred on the weekend following April 21, 2003, when Brown touched her breast. Although J could not remember a specific date for the sexual intercourse charged in Count 3, she testified that it happened at another time and she specifically recalled that it occurred "on the couch," that she was wearing a nightgown, and that Brown had told her at that time that "this was supposed to happen to [her]." It was clear from the testimony that the sexual intercourse in Count 3 occurred *after* the "first time" alleged in Count 2. Moreover, none of the other sexual intercourse

⁵ The prosecutor based this on the fact that J testified that the intercourse first occurred the weekend following the breast incident, which took place on April 21, 2003.

evidence referred specifically to "a couch," which appears to have been the distinguishing memory for J for Count 3.

¶145 The evidence at trial supported the amendment to Count 3. Ariz. R. Crim. P. 13.5(b). The amendment could not have prejudiced Brown because his sole defense was that he had never abused J and that the charges were the product of lies and fabrications on the part of J and her mother. The trial court did not abuse its discretion in granting the State leave to amend the charge, *State v. Sammons*, 156 Ariz. 51, 55-56, 749 P.2d 1372, 1375-76 (1988), and the amendment to Count 3 does not undermine its decision to admit the Rule 404(c) evidence.

¶146 Brown also argues that "the trial court created further prejudice" by denying his request to cross-examine J about "third parties" with whom she had contact during the same period as the alleged uncharged acts. Prior to the first trial, Brown filed a motion to conduct cross-examination regarding third parties and prior sexual acts involving J. The motion was premised in part on the fact that Kent Marshall had already been convicted of having sexual intercourse with J between October 1, 2005, and September 21, 2006, before J disclosed Brown's offenses, and that Marshall and Brown were both African-American of roughly the same age, height, and appearance. However, the motion also sought to question J about "multiple African-American males roughly matching the description of Mr. Marshall

and [Brown] [who] frequented [J's] home and even stayed with [J] and her mother over the past several years." Brown's motion was premised on the fact that J was exhibiting "script memory" issues regarding Brown's offense and could not recall specific details or times although she claimed to have been sexually abused by Brown "approximately 50 times." The judge in the initial trial permitted Brown to ask J and her mother questions regarding other African-American men who came into contact with J during the time frame in the indictment, but, with the exception of Marshall, the judge prohibited Brown from questioning J about sexual contact with any of these other men.

¶47 The first trial ended in a mistrial in January 2010. The State never contested Brown's motion with regard to Marshall. However, prior to the present trial, the State filed a motion to preclude Brown from questioning J about the "multiple African-American males roughly matching the description of Mr. Marshall and [Brown]." The Honorable Lisa M. Roberts, the trial judge in the present case, held a hearing on the motion during which she reviewed the prior trial judge's rulings with counsel and heard additional argument.

¶48 In support of his motion, defense counsel argued that J was "having memory issues in multiple other areas" and that it was "entirely possible . . . actually reasonably possible that she's also confusing the identity of the person responsible."

The prosecutor contested defense counsel's assertions that J had numerous, unsupervised contacts with other African-American males at the time of the offenses involving Brown. She stated that Sandra had told her that, "if there were other African-American males around her daughter" that she would have been with her daughter at the time and that it was only Brown, with whom Sandra "had developed a special relationship of trust . . . who, over time, had the unsupervised contact." If called upon to testify about contact with other men, mother would "state, one, that they weren't numerous, and, two, they were not unsupervised contact."

¶49 Judge Roberts pointedly asked counsel if J had exhibited "memory issues" during the first trial regarding the identity of the individual whom she was accusing of the charged offenses. The State avowed that she had "no problems with regard to that" and that J was "100 percent⁶ certain that it is this Defendant for those three acts and of the other acts that we have included for 404(c)." The memory issues involved the 404(c) evidence "which neither the Defendant nor [J], because of

⁶ During the present trial, J testified that "on a scale of 1 to 100" she was "100" percent sure defendant was the person who "played with [her] nipples on her cousin's birthday when [she] was nine years old;" "100" percent "sure this defendant . . . came into [her] bedroom about a week later and had sexual intercourse with [her] in [her] bedroom;" and "a hundred" percent sure that it was defendant who "told [her] that this was supposed to happen to [her] . . . [a]nd the couch incident."

the chronic nature of the abuse, can remember . . . those specific acts."

¶150 When Judge Roberts specifically asked defense counsel to address the identity testimony at the first trial, he conceded, "in all honesty, she seemed very confident." He nonetheless argued that "based on the other issues she's having with memory and the sheer number of these men, that it's reasonably possible that even though she's certain -- she says she's certain, that she may, in fact, be mistaken about identity." When asked to name the "other Black males," defense counsel gave the court four names: Tommy, who was C's father; Chris, a friend of Sandra's from work who was "regularly there;" Steffen, the boyfriend who prompted J's disclosure; Trey, who counsel thought "was a boyfriend prior to my client;" and "a couple of others" whose names counsel did not have but whom Brown "recalled."

¶151 Judge Roberts granted the State's motion to preclude, finding that the fact that other Black men may have been "in and out of the home": (1) was not "relevant to the issue in this case;" (2) did not "create a reasonable doubt as to the Defendant's guilt;" and (3) did not create "a reasonable possibility that any of those other unnamed black males committed the crimes." In reaching her decision, Judge Roberts acknowledged that she had "factored in" Brown's admissions in

the confrontation call and to police. On balance, she concluded that, "even if marginally relevant, under Rule 403, . . . the minimal relevance [was] substantially outweighed by the danger of unfair prejudice, confusion of issues and/or misleading the jury."

¶152 We review the admission or exclusion of evidence for abuse of discretion. "The decision whether to admit or exclude evidence is left to the sound discretion of the trial court." *State v. Murray*, 162 Ariz. 211, 214, 782 P.2d 329, 332 (App. 1989). Judge Roberts was well within her discretion in excluding the evidence in this case. The record reveals no instances of J having "memory issues" regarding the identity of her abuser, whether Brown or Marshall. Her "memory issues" pertained solely to the fact that for four years she was forced to engage in "routine" sexual intercourse with Brown that bore no distinguishing features in her mind as "the first time" did or "the time on the couch." The same memory issues applied to Brown. Brown's arguments were based on sheer speculation, and Judge Roberts properly determined that the evidence, if admitted, ran the risk of unnecessarily confusing the issues and misleading the jury.

CONCLUSION

¶153 For the foregoing reasons, we affirm Brown's

convictions and sentences.

_____/s/_____
JOHN C. GEMMILL, Judge

CONCURRING:

_____/s/_____
PETER B. SWANN, Presiding Judge

_____/s/_____
JON W. THOMPSON, Judge